No. 10108

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MONTGOMERY WARD & COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

	Page
Introduction	1
I. Respondent's contentions concerning the interpretation of the bargaining provisions of the Act are clearly without merit	3
A. The contention that the Board in determining whether an employer is bargaining in good faith may neither take into consideration the employer's lack of "willingness to modify demands" nor "pass judgment on the reasonableness of the terms on which an employer insists"	3
B. The contention that the Board in testing the respondent's good faith erroneously gave weight to its refusal to agree to do what the law compelled it to do at any event	6
1. Respondent's refusal to agree to reduce to writing whatever agreements might be reached	6
2. Respondent's refusal to bind itself to recognize the Unions and to refrain from discrimination against their employees	7
C. The contention that the Board erroneously considered respondent's solicitation of striking employees to return to work in reaching its conclusions concerning refusal to bargain	10
D. The contention that an employer is under no obligation to make any affirmative efforts to reach an agreement with his employees	12
II. Respondent totally misconceives the permissible scope of review of orders of the Board	15
Conclusion	18

AUTHORITIES CITED

Colorado Fuel & Iron Corp. v. *National Labor Relations Board*, 121 F. (2d) 165 (C. C. A. 10)	17
Consumers Power Co. v. *National Labor Relations Board*, 113 F. (2d) 38 (C. C. A. 6)	17
Continental Box Co. v. *National Labor Relations Board*, 113 F. (2d) 93 (C. C. A. 5)	17
District of Columbia v. *Murphy*, 62 S. Ct. 303	17
Howard Hall Co. v. *United States*, 62 S. Ct. 732	17
H. J. Heinz Co. v. *National Labor Relations Board*, 311 U. S. 514	7
Helvering v. *Gowran*, 302 U. S. 238	16

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Page

Helvering v. *Rankin*, 295 U. S. 123 16
McQuay-Norris Manufacturing Co. v. *National Labor Relations Board*, 116 F. (2d) 748 (C. C. A. 7) 8–9
National Labor Relations Board v. *Columbian Enameling & Stamping Co., Inc.*, 306 U. S. 292 13
National Labor Relations Board v. *M. A. Hanna Co.*, 125 F. (2d) 786 (C. C. A. 6) 17
National Labor Relations Board v. *Link-Belt Co.*, 311 U. S. 584 16
National Labor Relations Board v. *Nevada Consolidated Copper Corp.*, 62 S. Ct. 960 16
National Labor Relations Board v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241 16
National Labor Relations Board v. *George P. Pilling & Son Co.*, 119 F. (2d) 32 (C. C. A. 3) 4
National Labor Relations Board v. *Virginia Electric & Power Co.*, 314 U. S. 469 17
National Labor Relations Board v. *Waterman Steamship Corp.*, 309 U. S. 206 16
National Labor Relations Board v. *Yale & Towne Manufacturing Co.*, 114 F. (2d) 376, 379 (C. C. A. 2) 17
Rapid Roller Co. v. *National Labor Relations Board*, 126 F. (2d) 452 (C. C. A. 7) 4
M. H. Ritzwoller Co. v. *National Labor Relations Board*, 114 F. (2d) 432 (C. C. A. 7) 12
Singer Mfg. Co. v. *National Labor Relations Board*, 119 F. (2d) 131 (C. C. A. 7) cert. denied 313 U. S. 595 4, 5
Stonewall Cotton Mills v. *National Labor Relations Board*, decided June 3, 1942, (C. C. A. 5), 10 L. R. R. 514 5
Texas Co. v. *National Labor Relations Board*, 120 F. (2d) 186 (C. C. A. 9) 17
United States v. *Carolina Freight Carriers Corp.*, 62 S. Ct. 722 17
Virginian Railway Co. v. *System Federation No. 40*, 300 U. S. 515 6
Wilson & Co. v. *National Labor Relations Board:*
115 F. (2d) 759 (C. C. A. 8) 13
120 F. (2d) 913 (C. C. A. 7) 11

MISCELLANEOUS

Monthly Labor Review, May 1942, Vol. 54, No. 5, p. 1125 8
Written Trade Agreements in Collective Bargaining, Bulletin No. 4 .. 8

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

INTRODUCTION

In this case the Board petitioned this Court for enforcement of its order pursuant to Section 10 (e) of the Act, and the Company thereafter cross-petitioned to review and set aside the order pursuant to Section 10 (f) of the Act. The Company heretofore filed a full yellow-cover brief containing 69 pages which is denominated its brief upon its cross-petition. It has now filed a blue-cover brief of 56 pages which it denominated its brief upon the Board's petition for enforcement. The petition and cross-petition relate to a single cause, hence the Company is not complying with the rules of this Court in filing two principal briefs aggregating 125 pages.

The blue brief is of a character impelling certain general remarks. Instead of assisting the Court by coming to grips with the main issue whether evidence supports the Board's ultimate finding that the Company (hereafter called respondent) has not bargained in good faith, respondent seeks to divert the Court's attention from this crucial and controlling issue; both of respondent's briefs will be searched in vain for any recitation, chronological or otherwise, of the course of the negotiations which compelled the Board to find that respondent had engaged in unfair labor practices. Instead, respondent recites abstract, general, and on the whole inaccurate propositions of law. Moreover it has repeatedly injected into the case findings which it baselessly asserts the Board made, and attacks the Board upon the basis of these fictitious findings. Moreover, respondent hurls wholly unfounded allegations of unfairness and misrepresentation against the Board and its counsel. The Court will at once see through respondent's appeal to prejudice and dismiss it for what it is worth. Nor will this Court be diverted from the issue in the case by respondent's laborious efforts (see Point II, *infra,* pp. 15–18) to persuade the Court that it must subject the Board's findings herein to a scrutiny far in excess of that sanctioned by any other court, and must remand the case to the Board for reconsideration if it even be suggested that any immaterial error of law lurks in any subsidiary finding, no matter how remote from the Board's ultimate finding. We shall attempt in the following pages, while adhering as closely as possible to the central issue in the case and buttressing

our position with facts rather than epithets, to point out the error of respondent's contentions.

I

Respondent's contentions concerning the interpretation of the bargaining provisions of the act are clearly without merit

A. The contention that the Board in determining whether an employer is bargaining in good faith may neither take into consideration the employer's lack of "willingness to modify demands" nor "pass judgment on the reasonableness of the terms on which an employer insists"

While these two contentions are discussed separately in respondent's briefs (blue brief, pp. 13–14, 17–24, yellow brief, pp. 25–29), they are so related, in that they both in effect challenge the Board's power to appraise an employer's good faith in bargaining negotiations, that we shall discuss them together. In making these contentions, respondent is in effect obliquely renewing the argument which it presented to the Board (see Board's main brief p. 36 and footnote 18) but which it is now unwilling to urge openly in this Court, namely, that the Board is not entitled to appraise the employer's good faith in bargaining negotiations. It should be noted that the Board did not find that respondent's failure to offer concessions constituted a refusal to bargain, nor did the Board specifically find that respondent's lack of "willingness to modify demands" reflected upon its good faith in the negotiations.[1] Hence, this conten-

[1] The quoted phrase was merely used by the Board in the course of its general definition of collective bargaining. Moreover, only by lifting the phrase from its context is respondent afforded a basis for arguing that the Board interpreted the Act as requiring an employer to make concessions. The whole statement from which the phrase was lifted justifies no such interpretation (R. 56):

"Manifestly, in exploring the possibilities of reaching an agree-

tion is wholly irrelevant to the issues in the case.[2] We mention this contention only because it demonstrates so clearly respondent's unwillingness to accept the proposition, so thoroughly established in the law that respondent no longer openly contends to the contrary, that the Board has the power to appraise an employer's good faith in bargaining negotiations (see Board's main brief, pp. 36–38).

While an employer is free not to make concessions if honestly persuaded that they ought not be made, the Board may assess an employer's adamant "unwillingness to modify demands in accordance with the total situation" revealed by the course of the negotiations as one factor indicating lack of good faith. With this proposition the courts uniformly agree. *Singer Mfg. Co.* v. *National Labor Relations Board,* 119 F. (2d) 131, 136 (C. C. A. 7), cert. denied, 313 U. S. 595; *National Labor Relations Board* v. *George P. Pilling & Son Co.,* 119 F. (2d), 32, 37 (C. C. A. 3); *Rapid Roller Co.* v. *National Labor Relations Board,* 126 F. (2d) 452, 459–460 (C. C. A. 7). Hence, even if the Board had based its finding in part (though it did not in fact

ment the open and fair-mindedness and sincerity of purpose required by the Act contemplates an interchange of ideas, the communication of facts peculiarly within the knowledge of either party, personal persuasion, and willingness to modify demands in accordance with the total situation thus revealed."

With this statement as a whole there can be no disagreement.

[2] It is demonstrative of respondent's determination to avoid discussion of the main issues in the case that respondent should lead off its discussion of the Board's asserted misinterpretation of the law (blue brief, pp. 12–17) with a point which is not involved in the case.

do so) on respondent's unwillingness to make concessions in accordance with the total situation, it would have committed no error.

In urging that the Board lacks the power to pass judgment on the general reasonableness of the terms upon which an employer insists, respondent further refuses to accept the well established proposition that good faith is a basic element of the duty to bargain collectively and that the Board is entitled to inquire into that question. The Board, of course, may not, and does not presume to, dictate the terms which an employer must offer or accept. But it is entitled to inquire whether the employer's terms are within or without that broad range consistent with good faith bargaining. To compel the Board to accept at its face value any position and explanation offered by an employer, no matter how specious and unreasonable, would wholly deprive the Board of its principal means of measuring an employer's good faith and leave the Board nothing but the empty task of seeing that the employer goes through the motions of collective bargaining, even when the motions are "mere shadow-boxing." *Stonewall Cotton Mills* v. *National Labor Relations Board,* 10 L. R. R. 514 (C. C. A. 5). The right of the Board to pass upon the reasonableness of the employer's reasons for resisting certain provisions was expressly sustained by the Circuit Court of Appeals for the Seventh Circuit in *Singer Mfg. Co.* v. *National Labor Relations Board,* 119 F. (2d) 131, 138, cert. denied 313 U. S. 595. There the Court stated:

> Obviously petitioner was not bound to accept any particular provision. The only question is

> as to whether its resistance was bona fide. The Board believed that the petitioner's expressed reason for rejecting the lock-out provision was specious and that petitioner disclosed its lack of good faith when it said that lock-outs were prohibited and that the clause was therefore, unnecessary.

See also *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 550, and our principal brief, pp. 36–38.

B. The contention that the Board in testing the respondent's good faith erroneously gave weight to its refusal to agree to do what the law compelled it to do at any event

1. Respondent's refusal to agree to reduce to writing whatever agreements might be reached

In discussing this aspect of the case (yellow brief, pp. 42–43), respondent fails to point out the undisputed fact that at the September 19 meeting, in response to Union Representative Dixon's inquiry whether, if an agreement was reached, respondent would sign an agreement, Powell replied that "so far as [he] knew at that time, [he] didn't know of any contract in existence between the Company and labor organizations." These are Powell's own words (R. 857). At the November 25 conference, Powell again refused to commit respondent to sign, should an agreement be reached (see our main brief, pp. 12, 25–26). The Board characterized this conduct as a refusal to "agree to embody understandings that might be reached with the unions in signed contracts" (R. 58). Certainly Powell's rejoinder was not that of a negotiator interested in assuring the employee representatives of his good faith, and the Board properly drew an inference therefrom ad-

verse to respondent.[3] The charges in respondent's yellow brief (p. 42) that the Board drew an inference therefrom which the facts do not justify is wholly unwarranted.[4]

2. Respondent's refusal to bind itself to recognize the Unions and to refrain from discrimination against their employees

Respondent's view (yellow brief, p. 44, blue brief, p. 15) is that collective bargaining agreements should exclude provisions obligating the employer to do what he is already compelled to do as a matter of law. Such a proposition finds no justification either in reason or in actual practice. The purpose of the collective bargaining agreement is as the authorities agree, to stablize the employer-employee relationship and to serve as a permanent memorial of the basic conditions of employment. In this relationship recognition is of the essence. It is reasonable, therefore, that recognition should be one of the first matters covered in a collective

[3] Contrast Powell's rejoinder with that of Barr in the subsequent Board case involving respondent's Schwinn Warehouse at Chicago (39 N. L. R. B., No. 41), referred to in respondent's blue brief at pp. 45–46, wherein Barr replied to a similar inquiry—"We will sign anything to which we will agree." It would have been so easy for Powell to have made some similar reply during the negotiations in the instant case, but throughout the negotiations he steadfastly refused to do so.

[4] The inference which respondent (blue brief, p. 46) seeks to have the Court draw from respondent's newspaper announcement on March 21, 1941, that it would reduce to writing and sign any agreement reached, overlooks the fact (1) that this happened long after the bargaining conferences in the instant case had terminated, and (2) that it was obviously occasioned by the Supreme Court's decision, on January 6, 1941, in *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, which demonstrated that respondent's previous conduct in refusing to sign was in violation of the law.

bargaining agreement, and, as a matter of fact, such is the common procedure in actual practice.[5]

The fact that recognition is required by law under certain circumstances is plainly no reason for refusing to agree to it. Recognition is not an automatic matter; it is up to the employer to confer it. A specific grant of recognition in a collective bargaining agreement removes all uncertainty concerning a matter of vital importance to the employees and thus contributes to industrial peace.[6] Recognition is clearly a proper subject matter of agreement in a collective bargaining contract; respondent's refusal to obligate itself to confer it is of obvious significance on the issue of good-faith bargaining. See our main brief, pp. 26–27.

In its yellow brief at p. 44, respondent mistakes the purport of the holding of the Court in *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board,* 116 F. (2d)

[5] See *Written Trade Agreements in Collective Bargaining*, Bulletin No. 4, National Labor Relations Board, November 1939, a comprehensive study of trade agreements and their role in collective bargaining. In the section dealing with the contents of written agreements it is stated that the provisions of trade agreements may be roughly divided into four sections, the first of which normally "describes the processes of collective bargaining and indicates the status of the union, i. e., explicitly grants union recognition" (p. 39; see also p. 16).

[6] Evidence of the importance of recognition to employees is found in the statistics put out by the United States Bureau of Labor Statistics as to the causes of strikes. As late as 1941, 9.4 percent of all strikes were caused solely by the employer's refusal to grant recognition; these resulted in 10.7 percent of the man-day idleness in 1941. These figures do not take into consideration any of the many strikes in which the employer's failure to grant recognition was a contributing cause of the strike. See *Monthly Labor Review*, May 1942, Vol. 54, No. 5, p. 1125.

748, 751 (C. C. A. 7). A reading of the whole discussion of this point establishes beyond question that the Court in stating that "the recognition required by Section 9 (a) is not a bargaining matter" meant that the employer, without quibbling about the matter, must agree *in a contract* to a clause providing for exclusive recognition. The Court so held, notwithstanding the claim, identical with the claim made in this case, that the employer had in fact granted exclusive recognition.

We have fully treated in our main brief (pp. 27–28), respondent's contention concerning its refusal to agree to a nondiscrimination clause; it should be noted that the Board did not construe the Act, as respondent erroneously asserts on p. 15 of its blue brief, "as imposing an absolute duty to agree" to a nondiscrimination clause, but rather found (R. 61–62) that "respondent, by this 'refusal to do what reasonable and fair-minded men are ordinarily willing to do,' demonstrated its refusal to bargain collectively in good faith." This was by no means the only factor upon which the Board relied in reaching its ultimate conclusion concerning respondent's refusal to bargain, but only one of many (R. 62); nor, as respondent would have the Court believe, was it regarded by the Board independently and apart from everything else in the record as justifying a finding of a refusal to bargain. Respondent's strategy throughout its brief has been to approach piecemeal numerous factors which the Board found, in the aggregate, evidenced respondent's lack of good faith in the negotiations. The sole issue here is whether the Board's ultimate finding is warranted by the whole of the evidence.

C. The contention that the Board erroneously considered resondent's solicitation of striking employees to return to work in reaching its conclusions concerning respondent's refusal to bargain

Here again respondent strives to confuse the issues by insisting (yellow brief, pp. 60–62, blue brief, pp. 16–17) that the Board found that its solicitation [7] of the individual striking employees to return to work constituted "a *per se* violation of Section 8 (5)" of the Act. The Board's finding in full makes it plain that respondent's solicitation was but one of the factors which, when viewed in light of the other factors upon which the Board rested its ultimate finding, warranted an inference unfavorable to respondent's good faith in the negotiations. Thus the Board found (R. 67):

> Finally, the respondent, as noted below, solicited the individual striking employees to return to work in violation of Section 8 (1) of the Act. The respondent thereby violated its obligation to deal with the Unions as the exclusive representatives of the employees in the appropriate units herein found and such conduct re-

[7] There is no basis whatever for respondent's argument (blue brief, pp. 25–26) that the Board erroneously drew an inference of bad faith from the coercive statements of Superintendent McGowan. It was respondent's "solicitation" from which the Board drew an inference unfavorable to respondent. The Board treated respondent's telephonic activities as "solicitation" while McGowan's conduct was dealt with as "coercive statements" (R. 67, 73–74). While the Board held that both respondent's solicitation and McGowan's statements interfered with respondent's employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 74), the Board confined its attention to respondent's having "solicited the individual employees to return to work" (R. 67) in appraising respondent's good faith in the negotiations. The Board further spelled out what it meant by "solicitation" in

flects on its good faith in the collective bargaining negotiations.

The facts amply justify this appraisal. The pointed action of respondent's superintendents, at a time when the employees were out on strike because of respondent's refusal to deal in good faith with their representatives, in calling them individually on the telephone on a non-working day to announce that their jobs were open for them, was palpably a maneuver to break the solidarity of the strikers. The inference that by such solicitation respondent was "seeking to induce the striking employees to desert the unions and abandon their concerted activity" (R. 74) is a reasonable one on all the facts. Respondent's solicitation when thus viewed plainly warranted the Board's conclusion that respondent was not dealing with the Unions with the good faith required by the Act.

In citing (yellow brief, p. 61, blue brief, p. 16) *Wilson & Co.* v. *National Labor Relations Board,* 120 F. (2d) 913 (C. C. A. 7) in support of its argument that the solicitation under the circumstances of this case was lawful, respondent disregards the crucial distinction that in the instant case the strike was an unfair labor practice strike, having been caused by respondent's refusal to bargain collectively in good faith with the

terms applicable only to respondent's telephonic activities, as follows:

"communicating with the employees directly through its supervisory employees, and by stating to the employees that 'we are operating tomorrow as usual and your job is open for you if you want to come in'" (R. 74).

The charge of ambiguity which respondent levels against the Board's finding is thus entirely without foundation.

Unions, while in the *Wilson* case the Board found that the strike was not caused by unfair labor practices, as the Court pointed out (120 F. (2d), at 916). Compare *Ritzwoller Co.* v. *National Labor Relations Board,* 114 F. (2d) 432 (C. C. A. 7) in which the same Court held that the posting of a notice stating that "this plant will resume operations on Monday, July 26th, under the same terms and conditions as the plant has run in the past" constituted compelling evidence on the issue of a refusal to bargain (114 F. (2d), at 436).

D. The contention that an employer is under no obligation to make any affirmative efforts to reach an agreement with his employees

In its blue brief (p. 33), respondent still insists upon its position taken in its brief before the Board, namely, that the duty to bargain is no more than the duty to meet with the employee representatives and do or say nothing which would make a binding trade agreement impossible.[8] Our main brief at pp. 30–33 demonstrates

[8] This is precisely the position for which respondent contended in its brief before the Board and which it now complains the Board improperly cited as evidence of a "negative attitude" in collective bargaining (blue brief, p. 30), implying that this was a view of the law which was respondent's counsel's alone. With respondent's counsel here again arguing that this is the proper view it seems incomprehensible that counsel should take offense at the Board's attributing this view to respondent. Apart from this, however, there is no rational basis for distinguishing counsel from respondent. Stuart S. Ball, respondent's counsel before the Board, as well as in this Court, is secretary of respondent (R. 21, 96, 99), hence, any differentation between counsel and his client, such as is urged on pp. 30–31 of respondent's blue brief, is purely artificial. Furthermore, Ball, if not the sole arbiter of respondent's collective bargaining policy, was at least the official of respondent to whom Powell and Barr looked for guidance in collective bargaining matters (Resp. Exh. 18, R. 733–734). Par-

the error of this position, and cites the controlling authorities fully sustaining our position. The authorities cited by respondent (blue brief, pp. 32, 34) are inapposite. *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292, merely holds that an employer is not required to initiate bargaining negotiations in advance of a request from the employees. The *dictum* cited by respondent from *Wilson & Co.* v. *National Labor Relations Board,* 115 F. (2d) 759, 764 (C. C. A. 8), also has this plain meaning. This is a far cry from the proposition, which respondent urges, that the employer need take no initiative in the negotiations once they have been commenced by the employee representatives. That the Court in the *Wilson* case contemplated that the employer is required to take some initiative in the negotiations once they have been begun is at once evident from the fact that the Court stressed that the employer "had failed to submit counter offers to the Union at the time it rejected the Union's proposals" as a factor supporting the Board's conclusion of refusal to bargain (115 F. (2d), at 762). The *Wilson* case, therefore, instead of sustaining respondent's position, squarely supports the Board's view.

Respondent's further claim (blue brief, pp. 34–36) that the Board found that respondent had violated the Act simply by entertaining the belief that the Act required no affirmative efforts on its part to reach an agreement is without basis. Once again respondent

ticularly unwarranted in this situation are the charges of unfairness which respondent so readily hurls against the Board in connection with this aspect of the case.

seeks to divert the Court's attention from the issue in controversy by charging the Board with doing something which it did not do. The Board found a violation on the basis of respondent's actual conduct and not merely because of its state of mind (see R. 64–65). The Board's concluding finding makes this abundantly clear (R. 65):

> We are of the opinion, and find, that the respondent's attitude and *conduct* with respect to the union requests for counterproposals evidence "a want of good faith and, hence, a refusal to bargain" [Italics supplied.]

Respondent's alternative and somewhat inconsistent argument that although it was not required to take any initiative in the negotiations, it in fact did so, is simply not borne out by the facts. We have shown in our main brief at pp. 7–8, 11–12, 18–19, 22, 30–33, that respondent steadfastly refused to submit to the Unions any counterproposals although repeatedly requested to do so, and that when the Unions pleaded with respondent to give some suggestion as to what provisions it would be willing to agree to, respondent refused, declaring that it was up to the Unions "to make proposals that would please" respondent.

We are at a loss to understand respondent's reliance (blue brief, pp. 28–29) on Board's Exhibits 10 and 12 (copies of the proposed agreements of the Retail Clerks and the Warehousemen, upon which the Unions' representatives had noted respondent's comments concerning their proposals) as examples of affirmative efforts on its part to find a basis of agreement with the Unions. If Board's Exhibits 10 and 12 contain the best evidence

to which respondent can point as proof of its affirmative efforts to reach an agreement with the Unions, respondent's case is weak indeed, for these very exhibits establish the meagerness of respondent's efforts to find a basis for agreement. Of the 41 sections in Board's Exhibit 10 (R. 531–537) no suggestion was recorded as to 34 of the sections which included the Unions' principal proposals. Respondent's main contribution towards reaching an accord with the Warehousemen, as shown by Board's Exhibit 12, was the striking out of two-thirds of the agreement. Respondent could hardly have done less than is indicated on Board's Exhibits 10 and 12 and maintained even the pretense of bargaining.

II

Respondent totally misconceives the permissible scope of review of orders of the board

Respondent's complete lack of confidence in its whole case is evident from the argument which respondent interweaves throughout both of its briefs (yellow brief, pp. 64–68, blue brief, pp. 7–12, 47) that regardless of whether the record contains evidence which substantially supports the Board's ultimate finding, the cause must be remanded to the Board for further proceedings if the Court "no more than suspects that the Board acted under an erroneous view" of the Act in any respect, no matter how minor. In making this novel contention, respondent urges a scope of review of orders of the Board far in excess of that sanctioned by the authorities. The function of the Courts in reviewing orders of the Board is confined to determining

whether there is substantial evidence to support the Board's ultimate finding, and whether the order is appropriate. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 586, 597; *National Labor Relations Board* v. *Waterman Steamship Corp.* 309 U. S. 206, 208–209, 226; *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.,* 62 S. Ct. 960. If under a correct view of the law the Board's ultimate findings were justified by the facts as found by the Board, the Court has no alternative but to enforce the Board's order, notwithstanding that the Board might have made some error on some subsidiary point of law. The Supreme Court specifically pointed this out in *Helvering* v. *Rankin,* 295 U. S. 123, 132–133, relied on by respondent (blue brief, p. 6):

> But even if the Board's decision had been based on an erroneous rule of law, that would not have justified its reversal, if the findings of fact, governed by the correct rule of law, were sufficient to sustain the decision and had substantial support in the evidence.

Cf. *Helvering* v. *Gowran,* 302 U. S. 238, 245–246.

In none of the many cases involving the Board in the Supreme Court has the refinement which respondent suggests ever been intimated. To the contrary, even where the Board has made an error of fact upon which an ultimate conclusion in part rests, the Courts have shown no hesitancy in enforcing the Board's order if other substantial support for the Board's ultimate finding and order is found in the record. Thus in *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Corp.,* 308 U. S. 241, 247, the Court stated:

> The respondent criticizes several of the findings as without support or contrary to uncontradicted evidence. We do not stop to consider these contentions, since without such findings, there would still be a basis in the record for the Board's conclusions.[9]

In *United States* v. *Carolina Freight Carriers Corp.*, 62 S. Ct. 722, and *Howard Hall Co.* v. *United States*, 62 S. Ct. 732, cited by respondent on pp. 11–12 of its blue brief, the error of law which in the Court's opinion warranted the remand concerned, as the Court noted, "basic or essential findings" upon which both cases hinged (62 S. Ct., at 729). This is also true of the other decisions cited by respondent including *Texas Co.* v. *National Labor Relations Board*, 120 F. (2d) 186 (C. C. A. 9); *District of Columbia* v. *Murphy*, 62 S. Ct. 303; and *National Labor Relations Board* v. *Virginia Electric and Power Co.*, 314 U. S. 469. Where basic findings are erroneous, a remand is, of course, appropriate. But in the instant case even if it be assumed, without conceding, that the Board did err in one or more of the subsidiary respects claimed by respondent, the Board's order is nevertheless entitled to enforcement for the reason that, as in the *Newport News* case, there remains substantial evidence under a

[9] To the same effect are *Colorado Fuel and Iron Corp.* v. *National Labor Relations Board*, 121 F. (2d) 165, 174 (C. C. A. 10); *National Labor Relations Board* v. *M. A. Hanna Co.*, 125 F. (2d) 786, 789 (C. C. A. 6); *National Labor Relations Board* v. *Yale & Towne Manufacturing Co.*, 114 F. (2d) 376, 379 (C. C. A. 2); *Consumers Power Co.* v. *National Labor Relations Board*, 113 F. (2d) 38, 43 (C. C. A. 6); *Continental Box Co.* v. *National Labor Relations Board*, 113 F. (2d) 93, 96–97 (C. C. A. 5).

proper view of the law which fully supports the Board's ultimate finding and order.

CONCLUSION

It is respectfully submitted that respondent's contentions concerning the proper interpretation of the bargaining provisions of the Act are without merit, that the facts, under a correct interpretation of the Act, fully justify the Board's ultimate finding that respondent refused to bargain collectively in good faith with the Unions, and that the Board's order is entitled to full enforcement as prayed in the Board's petition for enforcement.

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